Westside Painting, Inc. *and* International Brotherhood of Painters and Allied Trades, District Council #55, AFL–CIO. Case 36–CA–8067

June 24, 1999

DECISION AND ORDER REMANDING TO ADMINISTRATIVE LAW JUDGE

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

The exceptions filed in this case present the question whether the judge erred in granting the General Counsel's Motion for Approval to Take Telephonic Testimony.[1] In agreement with the Respondent, we find, for the reasons set forth below, that the judge should have denied the General Counsel's motion on the ground that telephonic testimony is not admissible under the Board's Rules.

Procedural Background

On May 22, 1998,[2] the General Counsel filed a motion with the judge seeking to adduce discriminatee Shawn Cotto's testimony by telephone at the Board hearing to be held in Portland, Oregon. In the motion, the General Counsel asserted that Cotto presently resided in Brooklyn, New York, that Cotto's testimony would be brief, and that in light of the Board's then budgetary constraints, "the advantages of telephonic testimony far outweigh the costs associated with bringing Mr. Cotto across country to Portland, Oregon." Further, the General Counsel claimed that another witness would be called who would corroborate Cotto's testimony. The Respondent filed a response asserting that the motion should be denied in the absence of any written rule allowing for telephonic testimony. Further, the Respondent argued that because Cotto is the alleged discriminatee, his "credibility is a key part of this case and can best be evaluated by his appearance in person at the hearing." The Respondent also maintained that Cotto's failure to appear would prevent the Company from receiving a fair hearing.

On May 29, the judge issued an order granting the General Counsel's motion. The judge stated, that, on balance, he was not convinced that the taking of telephone testimony "in this limited instance and under the extreme circumstances shown here" would compromise the opportunity for a fair hearing. The judge observed that the Respondent would have an opportunity to cross-examine Cotto and any other witness offered by the General Counsel. The judge did not cite any authority in support of his ruling.

Cotto testified by telephone at the hearing. The judge credited Cotto's testimony and the corroborating testimony of Gayland Gabbard,[3] and discredited the conflicting testimony of the Respondent's witnesses. The judge concluded that the Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully questioning Cotto about his union preference and refusing to employ him because he expressed support for the Union. In reaching his conclusions, the judge did not consider Cotto's demeanor.

In its exceptions, the Respondent contends that the judge erred by taking Cotto's testimony by telephone. The Respondent argues that because the case rests on credibility resolutions, the judge's inability to evaluate Cotto's demeanor deprived him of the opportunity to fairly assess Cotto's credibility.

Discussion

The examination of witnesses in unfair labor practice cases is governed by Section 102.30 of the Board's Rules and Regulations, Series 8, as amended, which provides, inter alia, that "[w]itnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition." This Rule is of long standing. Section 102.30 was first promulgated in its present form in 1942 and has not been substantively changed in over 55 years.[4] The predecessor of current Rule 102.30 was one of the first rules ever promulgated by the Board. Adopted in 1935, that Board Rule similarly provided in relevant part that "[w]itnesses shall be examined orally under oath, except that for good and exceptional cause the Trial Examiner may permit their testimony to be taken by deposition under oath." Article II, Section 19, of the Board's Rules and Regulations, Series 1.

We find that Rule 102.30 expresses a preference for live oral testimony and therefore we construe it to require the physical presence in the hearing room of the witness being "examined orally." The Rule contains but a single exception: "for good cause shown . . . testimony may be taken by deposition." The Board has consistently interpreted the exception to mean that depositions may be taken for use as evidence in an action where there is reason to believe that the witness whose deposition is sought may be unavailable at the hearing. *Bill Johnson's Restaurants*, 249 NLRB 155, 166 (1980), enfd. 660 F.2d 1335 (9th Cir. 1981), vacated on other grounds and remanded 461 U.S. 731 (1983). See *NLRB v. Interboro Contractors*, 432 F.2d 854, 857 (2d Cir. 1970).[5] In other

[1] On June 29, 1998, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] All dates are in 1998, unless stated otherwise.

[3] Gabbard is the Timberlake Job Corps Center painting instructor who accompanied Cotto to his employment interview with the Respondent.

[4] Compare 7 Fed.Reg. 8679 (1942), with Sec. 102.30 of the current Board Rules.

[5] See also NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings, sec. 10352.3, which states that the "good cause" requirement "relates generally . . . to situations where the witness will not be available to testify at the hearing. The lack of availability may

words, if a witness is not available to testify at the hearing there is one, and only one, alternative method of securing his testimony: by deposition.[6] There is plainly no provision in Rule 102.30 for the alternative, used by the judge here, of taking the testimony of the absent witness by telephone.[7]

The Board's practice under the Rule provides substantial support for our interpretation. During the almost 65-year period that Rule 102.30 or its predecessor have been in effect, there is not a single Board case permitting the use of telephone testimony.

As the District of Columbia Circuit correctly observed, Board law "express[es] a strong preference for live oral testimony." *Canadian American Oil Co. v. NLRB*, 82 F.3d 469, 475 (D.C. Cir. 1996). We agree with the court that there are "manifold benefits that live oral testimony offers." Id. Most importantly, live oral testimony enables the judge to observe the demeanor of the witness to determine the witnesses' veracity. As the Board stated in its landmark decision in *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), one of the most frequently cited Board cases, "the demeanor of witnesses is a factor of consequence in resolving issues of credibility." The demeanor of a witness may convince the trier of fact that his testimony is true. Likewise, "the demeanor of a witness may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story." *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). The opportunity to observe the demeanor of a witness is particularly important in Board proceedings because, as the instant case vividly illustrates, a judge is often presented with situations where there is conflicting testimony and credibility determinations are central to the resolution of the case.

In addition, the use of telephone testimony may impair a party's right of cross-examination and raise fundamental questions about the fairness of the hearing. For example, a witness testifying by telephone may be reading from a prepared statement or may have other documents before him of which an opposing party is entirely unaware. Indeed, there could even be another individual standing by the side of the "telephone witness" influencing his testimony. While there is no suggestion of any such conduct here, nonetheless because the "telephone witness" is not physically present in the hearing room, it is simply not practicable for the judge to guard against such potential misconduct and ensure the integrity of the hearing.

For all these reasons, we hold that, under Section 102.30 of the Board's Rules, witnesses in Board unfair labor practice proceedings may not testify by telephone. Therefore, it was error for the judge to grant the General Counsel's motion and permit Cotto to testify by telephone. Accordingly, we shall strike Cotto's telephone testimony and remand the case to the judge, who shall, at the option of the General Counsel, either proceed on the record without consideration of Cotto's testimony, or reopen the record and allow the General Counsel to bring in Cotto to testify in person at a hearing.[8] The judge shall then issue a supplemental decision and recommended Order, revising his findings, conclusions, and recommendations, if appropriate.

ORDER

It is ordered that the telephone testimony of Shawn Cotto is stricken from the record.

IT IS FURTHER ORDERED that the proceeding is remanded to Administrative Law Judge William L. Schmidt to either reopen the record to allow the General Counsel to bring in Cotto to testify in person at a hearing, or to proceed on the record without consideration of Cotto's telephone testimony. The judge shall then revise his findings, conclusions, and recommendations, if appropriate.

IT IS FURTHER ORDERED that the judge prepare and serve on the parties a supplemental decision setting forth, if necessary, revised credibility resolutions, findings of fact, conclusions of law, and a recommended Order consistent with this remand. Copies of the supplemental decision shall be served on all the parties after which the
provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

be due to the witness' illness or to the fact that he/she is not within reasonable proximity of the place of the hearing or to other circumstances."

[6] In exceptional circumstances in which the witness was either deceased or so seriously ill that neither oral testimony nor a deposition could be taken, an affidavit may be admissible. See *Limpco Mfg.*, 225 NLRB 987 fn. 1 (1976), enfd. 565 F.2d 152 (3d Cir. 1977).

[7] By contrast, Rule 43(a) of the Federal Rules of Civil Procedure was amended in 1996 to provide for the contemporaneous transmission of testimony from remote locations "for good cause shown in compelling circumstances and upon appropriate safeguards." Of course, the Federal Rules of Civil Procedure "are not controlling in administrative hearings before the Board." *East Texas Motor Freight*, 262 NLRB 868, 904 (1982). Further, the Advisory Committee Note to the 1996 amendment to Rule 43 states that deposition procedures, which ensure the opportunity of all parties to be represented while the witness is testifying, "provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses." Board Rule 102.30 accords with this observation by specifying deposition procedures as the only alternative to live testimony at the hearing.

[8] Of course, nothing in our decision today would prohibit the General Counsel from filing, in accordance with Sec. 102.30 of the Board's Rules, an application with the judge to take Cotto's testimony by deposition.

Linda Scheldrup, Esq., for the General Counsel.
Sam Boulis, President of Westside Painting, Inc., of Portland, Oregon, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. Based on a charge filed by the International Brotherhood of Painters and Allied Trades, District Council #55, AFL–CIO (the Union) on August 22, 1997,[1] the Regional Director for Region 19 issued a complaint on January 26, 1998, alleging that Westside Painting, Inc. (Respondent or Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act). Specifically, the complaint alleges that Respondent's supervisors and agents, Sam Boulis and Roy Porter, coercively interrogated job applicant Shawn Cotto concerning his union membership and sympathies and refused to hire Cotto as an employee because Cotto assisted the Union and expressed his interest in and support for the Union. Respondent's timely answer denies that it engaged in the unfair labor practices alleged.

I heard this matter on June 11, 1998, at Portland, Oregon. After considering the entire record, the demeanor of the witnesses who appeared before me,[2] and the oral argument presented by the General Counsel and Respondent,[3] I have concluded that Respondent violated the Act as alleged on the basis of the following

FINDING OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it is a State of Oregon corporation with an office and place of business in Portland, Oregon, where it is engaged in business as a painting contractor. Respondent further admits, and I find, that during the 12-month period prior to the issuance of the complaint, Respondent's gross sales exceeded $500,000 and its direct outflow or indirect outflow as well as its direct inflow or indirect inflow exceeded $50,000. Respondent further admits, and I find based on the foregoing, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent's answer avers a lack of knowledge concerning the Union's status as a labor organization within the meaning of Section 2(5) of the Act and, hence, denies that allegation in the complaint. John Kirkpatrick, a business manager of an area local union affiliated with the International Brotherhood of Painters and Allied Trades, AFL–CIO, testified that District Council #55 is an intermediate body comprised of representatives, such as himself, of area local unions affiliated with that International Union. District Council #55 negotiates collective-bargaining agreements covering wages, hours, and working conditions with area employers applicable to the tradesmen represented by the local unions. Kirkpatrick further testified that he was elected by the members of his local union who are employed by area contractors to serve as the business manager for a term of 3 years. As the foregoing shows that District Council #55 is an organization in which employees participate and which exists in part for the purpose of dealing with employers concerning the wages, hours, and working conditions of employees, I find that District Council #55 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Relevant Facts

As noted, the complaint charges that Respondent questioned Cotto concerning his union sympathies and refused to hire Cotto because of his union sympathies. The critical events all occurred at a job interview on August 18 in the office of Respondent's president, Sam Boulis. In addition to Boulis and Cotto, everyone agrees that Gayland Gabbard, a painting instructor at the Timberlake Job Corps Center, and Roy Porter, an individual employed by Respondent for the past 17 years, were also present throughout. There is a sharp conflict in the testimony about what occurred at that time necessitating findings as to the background and events leading up to the critical August 18 interview.

Respondent has obviously been in business as a painting contractor in the Portland area for a considerable period of time. The complaint alleges that Sam Boulis is the Company's owner and that Roy Porter is its superintendent. Both, the complaint further alleges, are supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act. Respondent admits, and I find, that Boulis is a supervisor and agent as alleged but Respondent denies that Porter is either a supervisor or an agent. At the hearing, Boulis testified that Porter is a master painter who, at the time of Cotto's interview, served as the temporary replacement for Mike Gohman, Respondent's general superintendent, during Gohman's 2-week vacation. Porter, on the other hand, testified that from May through December he served as a superintendent for the Company and that during this period he hired a number of employees to work for the Company. Based on this testimony by Porter, which I credit, I find that Porter also was a supervisor and agent of Respondent at the relevant time.

Although there is some indication in the record that the Company has, in the past, had a collective-bargaining relationship with the Union, no such relationship existed in August or at the time of the hearing. However, Boulis and other witnesses alluded to recent disputes which the Company has had with the Union that have resulted in picketing by the Union at some of the Company's projects.

In the period immediately prior to the August interview, the Company obtained a contract to perform work at the Portland city hall. Although not fully explained, the city of Portland apparently requires its contractors to establish a certain level of minority hiring and this requirement became a problem for the Company. As a result, Boulis set about attempting to hire an apprentice from a qualifying minority group but encountered some difficulty. According to Boulis, Lisa Colligan, an employee in the city's purchasing bureau, offered to assist in locating minority applicants and did so by faxing a notice dated

[1] Where not shown otherwise, all further dates refer to the 1997 calendar year.

[2] Prior to the hearing, I granted the General Counsel's motion seeking to have Cotto testify by telephone on the ground that the expenses associated with having him testify in person would be all out of proportion to what is at stake in the case. Respondent objected to this procedure. Shortly after the events relevant to this case, Cotto moved to New York City where he now permanently resides and works. As Cotto testified by telephone, his demeanor has not been considered in reaching my conclusions in this case. My Order granting this motion [G.C. Exh. 1(i)] is corrected to reflect that my conference with the parties about that motion occurred on May 28 rather than February 28.

[3] The parties were allowed until June 19, 1998, to supplement their oral argument with written submissions. The Respondent submitted supplemental argument on June 19 which has also been considered.

August 7 to several organizations, including the Job Corps. That notice listed the Company, an "open shop," as seeking an apprentice painter for hiring as soon as possible and provided details concerning the Company's location, telephone and individuals to contact as well as certain requirements about enrolling in an approved apprenticeship program. The notice further indicated that applications by minorities or females were encouraged. Shortly thereafter, this notice came to the attention of Gabbard at the Timberlake Job Corps Center.

Shawn Cotto was about to complete the painters' program at the Timberlake Job Corps Center when the Company's notice came to Gabbard's attention. Cotto had been enrolled in that program at Timberlake since August 1996. The Timberlake Job Corps Center, is located at a remote site 28 miles outside of Estacada, Oregon, in the Mt. Hood National Forest, approximately 1-1/2 hours or more by automobile from Portland. This Job Corps Center is partially funded by the Department of Labor but it is staffed by instructors, some of whom are employed by various trade unions.[4] Gabbard explained that the center's resident students are "at risk" individuals whose ultimate goal is employment. In preparation, the center trains students in the ordinary protocol of working, provides a GED program for the completion of a high school level education and entry level trade school training, and assists students in finding employment on completion of the program. Thus, Gabbard, who became an instructor for the painters' program at the Timberlake Center shortly before the relevant events, is an employee of the International Brotherhood of Painters and Allied Trades, AFL–CIO. Gabbard holds no office in the International Union or any of its affiliates; his employment relates solely to the Timberlake Center. Gabbard explained that his primary goal "above all else" was the job placement of the course graduates, whether with union and nonunion employers.

After receiving Colligan's notice, Gabbard telephoned the Company around August 13 and spoke with Boulis. During their conversation, Gabbard explained the Timberlake program and informed Boulis that there were several individuals about to complete the painters' program there. When Boulis told Gabbard that he was primarily interested in a minority applicant, Gabbard suggested that he might want to interview Cotto, a Timberlake resident Gabbard described as ethnically "half black and half Puerto Rican." Boulis agreed to interview Cotto and made an arrangement with Gabbard to bring him to the Company's Portland office for a job interview on Monday, August 18. At the conclusion of their conversation, Gabbard felt confident that Boulis would employ Cotto; otherwise, Gabbard explained, he "wouldn't have made the trip."

However, in the course of their conversation Boulis told Gabbard at some length about the Company's current dispute with the Union. Gabbard recalled that Boulis said that the Union wanted him to sign a contract and that they had recently picketed some of the Company's projects. While discussing this subject, Boulis asked Gabbard if this would present a problem about placing a student with his Company. Gabbard told him that he did not know but that he would check. Gabbard explained that his concern over this particular placement was that the Company had an ongoing dispute with the Union, not that the Company was nonunion. In any event, Gabbard telephoned Kirkpatrick after speaking with Boulis and made an appointment to meet with him at the Union's Portland office prior to Cotto's job interview.

On the morning of August 18, Gabbard and Cotto arrived in Portland, stopping first at the Union's office. There they met some of the Union's representatives and then spoke with Kirkpatrick. He assured Gabbard and Cotto that, notwithstanding the recent dispute, the Union had no objection to Cotto's placement with the Company and that it would not affect Cotto's chances of getting into the Union's apprenticeship program should he choose to do so later. During their meeting, Kirkpatrick gave both men some materials with the Union's logo, including a white T-shirt. There is agreement that at least Cotto put on his newly acquired T-shirt and that he was wearing it when he arrived at the Company for his interview. The T-shirt had a dark, single-colored union logo, perhaps 3 to 4 inches in diameter, on the upper left front of the shirt. A larger, multi-colored union logo with a graphic overlay of a paintbrush appeared on the back of the shirt. Cotto did not join the Union nor is there any evidence that Cotto authorized the Union to represent him in any fashion.

At the Company, the receptionist greeted Cotto and Gabbard and provided Cotto with an employment application to complete. On finishing that task, the two men were introduced to Boulis, ushered into his office, and seated in front of his desk. Boulis was seated behind his desk and Porter was likewise seated behind the desk but off to one side. Boulis claims to have been aware of Cotto's union T-shirt from the outset but, if so, he made no immediate comment about it. There is general agreement that the interview initially proceeded in a typical fashion and that up to a point, it seemed implicit, if not stated explicitly, that Cotto would be hired. Although Boulis and Porter deny it, Gabbard and Cotto recalled that Boulis told Cotto "Welcome aboard." Cotto recalled that Boulis also added, "We'll be happy to have you here.

What occurred thereafter is sharply disputed but everyone agrees that Cotto ultimately was not hired. Gabbard recalled that following a handshake after Boulis told Cotto "Welcome aboard," Boulis' demeanor suddenly changed. Cotto testified that at some point following the "Welcome aboard" remark, Boulis began staring at his T-shirt. They both say that Boulis then asked Cotto if he wanted to be union and Cotto told him that he did. At this point, Gabbard said that Boulis then told them that he had just hired "two Russians" that morning so he had filled his quota for apprentices and that Cotto would not be able to work there. Cotto recalled that Boulis began shaking his head and told him that wouldn't be happy there, that they were having problems with the Union, and the Union would not be happy with him working there. Cotto further recalled that he asked Boulis if that meant he could not work there if he was in the Union and that Boulis told him that was the case. In addition, Cotto recalled that Boulis also mentioned that he had just hired two Russians that filled his quota. Gabbard recalls that Porter remarked: "We don't hire union people." Cotto recalled that Porter mentioned that the Company was having problems with the Union and that the Union would not be happy with him working there. Gabbard and Cotto further claim that as they were leaving Boulis told Gabbard that he should bring in some open-minded, nonunion people the next time.

[4] Gabbard explained that the center's resident students are "at risk" individuals whose ultimate goal is employment. In preparation, the center trains students in the ordinary protocol of working, provides a GED program for the completion of a high school level education and entry level trade school training, and assists students in finding employment on completion of the program.

Boulis agreed that he had every intention of hiring Cotto but asserts, in effect, that Cotto rejected the job because the Company was nonunion. Porter also agreed that the drift of the interview up to a point carried the implication that Cotto would be hired. Boulis asserted that Cotto's T-shirt had no bearing on the matter as he was already aware that Cotto had been affiliated with the Union through his Job Corps training.

According to Boulis, after the interview proceeded through the routine questions and answers, he began explaining certain company policies related to the work hours and timecard procedures. Thereafter, Boulis claims that he began to explain the Company's benefit program. In the course of this explanation, Boulis claims that Cotto interrupted him to ask: "Why are you telling me all this?" In response, Boulis explained that he was merely letting him know what the Company provided. Cotto then purportedly asked: "Isn't that the norm?" This prompted Boulis to explain that some open shops do not provide any benefits at all but that "we take care of our employees." Boulis testified that Cotto next asked what he meant by "open shop" and he told Cotto that it meant "we're not union . . . [i]t's a nonunion shop." At this point, Boulis said that Cotto "got into a frenzy and stated "Oh, I don't want to be non-union, I want to be union." Boulis claims that he then remarked that he did not see what "the union can offer that we can't." In reply, Boulis claims that Cotto stated: "Oh, they will take care of me. I don't want to work here, I want to be union." At that point, Boulis said that Cotto got up as though to leave and Gabbard simply shrugged and started to leave also. Boulis recalled that he then remarked: "Well, I don't think you'd be happy with us either." Boulis testified that he said nothing further to Cotto but that he may have remarked to Gabbard that if he had "anybody that's willing to work, please bring them back."

According to Porter, while Boulis was explaining the Company's benefits Cotto "said he didn't want to be nonunion." Porter said that after Cotto "insisted" three or four times that "he wanted to be union," Boulis told Cotto that he "didn't think it would work out between us" and they all shook hands, said good-bye and they (Gabbard and Cotto) left. Porter said that he did not notice the nature of Cotto's T-shirt until he turned to leave and at that time he saw the logo on the back because it was about the size of a dinner plate.

Both Boulis and Porter denied that any "Welcome aboard" remark occurred during the interview. Likewise, Boulis agreed that the Company had hired two apprentices of Russian heritage at that time but both he and Porter flatly denied that any mention was made of these two employees in Cotto's interview. Finally, Respondent presented evidence showing that it hired another employee, Jorge Madrid, during the week prior to Cotto's interview. Madrid submitted two letters of recommendation written by instructors at other Job Corps Centers on the International Union's stationery when he applied for work with Respondent in July. In addition, Madrid also presented pay stubs showing that he had worked for an employer who had deducted union dues from his pay. Porter testified that Madrid told him after he started to work that he was "union."

B. Further Findings and Conclusions

Section 7 of the Act guarantees employees the right "to self–organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective–bargaining or other mutual aid and protection." Section 8(a)(1) prohibits employer interference, restraint, or coercion of employees exercising rights guaranteed by Section 7. The Board has held that the employers who question applicants about their union preferences violate Section 8(a)(1). *United L-N Glass, Inc*., 297 NLRB 329 fn. 1 (1989). See also *Honda of Hayward*, 307 NLRB 340, 349 fn. 9 (1992), and the cases cited therein.

Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." The Supreme Court has held that an employer's refusal to hire applicants for employment because of their union preferences violates Section 8(a)(3). *Phelps–Dodge Corp. v. NLRB*, 313 U.S. 117 (1941).

Obviously, the outcome of this case rests on a resolution of the credibility question presented by the two conflicting accounts detailed above. If the General Counsel's witnesses, Cotto and Gabbard, are credited, then there is direct evidence that Boulis questioned Cotto about his union sympathies and refused to hire Cotto after he stated that he wanted to be "union." On the other hand, if Respondent's witnesses, Boulis and Porter, are credited, the conclusion is inescapable that Cotto simply declined to work for the Company after he learned that it was nonunion. After carefully studying the accounts given by the four witnesses present at the interview and considering the entire record, I have concluded that the account of Cotto and Gabbard merits belief principally for the following reasons.

First, I am persuaded that the account of the interview provided especially by Gabbard is reliable. Although Gabbard is employed by the International Union as an instructor at the Timberlake Center and consulted with District Council #55 about Cotto's placement with Respondent, his explanation for doing so is reasonable. Nothing in his actions indicate in anyway a basis for concluding, as Respondent argues, that he or Cotto participated in some malevolent scheme hatched by the Union to set Respondent up.

Second, if I credit denial by Boulis and Porter that any discussion occurred in the interview about the contemporaneous hiring of the two apprentices characterized as Russians, I would be required to infer at least implicitly that Cotto and Gabbard had some independent means of obtaining this information. Nothing in this record would warrant such an inference. Indeed, the fact that they came from a remote location somewhat removed from the Portland area, presumably returned there after the interview, and had no other contact with Respondent strongly suggests otherwise. Contrary to Respondent's assertion that these other two apprentices have nothing to do with this case, I find that knowledge by Cotto and Gabbard of this "insider" information is highly significant in resolving credibility. Gabbard's account shows that Boulis seized on the recent employment of the two Russian apprentices as an excuse for not hiring Cotto immediately after he acknowledged his affinity for the Union. According to Gabbard, the "quota" issue Boulis addressed at that particular time related to the ratio of apprentices to journeymen rather than minorities in the Company's work force. I again find that this explanation by Gabbard contains a thread of authenticity. Accordingly, I find it reasonable to conclude that it is highly probable Cotto and Gabbard only learned of these two particular apprentices in the manner described by Gabbard.

Third, Boulis' explanation about the course of the interview strikes me as improbable. This job was to be Cotto's initial

work experience following extended training in the rudiments of the painter's trade at the Timberlake Center. As Gabbard indicated, the whole thrust of this program was directed toward obtaining employment for "at risk" individuals. After a year in such a program with that type of emphasis, I find it highly unlikely that Cotto would have interrupted to briskly dismiss Boulis' benefit description in the manner described by Boulis. Hence, I am persuaded that the scenario depicted by Boulis is not probable.

In reaching my conclusion, I am fully cognizant that Respondent hired Madrid, another graduate of a similar Job Corps program. Beyond that, however, the record is virtually devoid of further evidence which might cause this fact to be accorded more significant weight. Thus, evidence about the details of Madrid's interview or other disclosures are lacking as are the details of the degree of Madrid's involvement with the Union. Hence, I find the evidence about Madrid's hiring is not sufficient to overcome the deficiencies discussed above in the accounts provided by Boulis and Porter.

For the foregoing reasons, I credit the account of Cotto and Gabbard as to the course of the August 18 job interview. Hence, I find that Boulis unlawfully interrogated Cotto concerning his union sympathies and refused to hire him after Cotto disclosed his support for the Union in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By questioning Shawn Cotto on August 18 concerning his union preferences, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By refusing to employ Shawn Cotto on August 18 because he expressed support for the Union, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

5. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel seeks only to have Cotto made whole for the losses he suffered as a result of Respondent's refusal to employ Cotto as described above. According to the General Counsel, shortly after his interview with the Company Cotto found a job locally which he admittedly quit in order to relocate to the east coast where he now resides and works. In these particular circumstances, the General Counsel believes, in effect, that now requiring Respondent to offer employment to Cotto would extol form over substance. As it appears that Cotto has voluntarily removed himself from the Portland area labor market, I find the General Counsel's limited remedial request reasonable under the circumstances. Accordingly, my recommended Order is limited to requiring Respondent to make Cotto him whole for any loss of earnings and other benefits he suffered by reason of its failure to employ Cotto on August 18, 1997. Backpay, if any, shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Westside Painting, Inc., Portland Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to employ applicants for employment who express support for International Brotherhood of Painters and Allied Trades, District Council #55, AFL–CIO or any other union.

(b) Questioning applicants for employment concerning their union preferences.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, or discriminating against employees because of their union sympathies.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Shawn Cotto whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the administrative law judge's decision in this case.

(b) Within 14 days after service by the Region, post at its Portland, Oregon facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 1997.[7]

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[5] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[7] This month represents the approximate date of the first unfair labor practice in accord with the requirement the Board established in *Excel Container,* 325 NLRB 17 (1997).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT question applicants for employment about their union preferences.

WE WILL NOT refuse to hire applicants for employment because they express support for International Brotherhood of Painters and Allied Trades, District Council #55, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees because they exercise rights guaranteed by the Act.

WE WILL make Shawn Cotto whole, with interest required by law, for the losses he incurred because we refused to hire him on August 18, 1997.